

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

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|--------------------------------------|---|------------------------------|
| IN THE MATTER OF |) | |
| THE PERMIT OF |) | |
| |) | |
| MCINTOSH ENERGY COMPANY, INC. |) | PERMIT NO. DL02-22761 |
| d/b/a MAC FOOD MART |) | |
| 6925 STATE ROAD 930 EAST |) | |
| FORT WAYNE, INDIANA 46803 |) | |
| |) | |
| Applicant. |) | |

**PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. BACKGROUND OF THE CASE

The Applicant, McIntosh Energy Company Inc., d/b/a Mac Food Mart (“Applicant”), located at 6925 State Road 930 East, Fort Wayne, Indiana 46803, permit number DL02-22761, is the Applicant for a type 115¹ Alcohol & Tobacco Commission (“Commission”) permit. The application was assigned to the Alcoholic Beverage Board of Allen County (“Local Board”). The Local Board held a hearing on November 13, 2006 and voted three (3) to zero (0) to deny the application. The Commission adopted the Local Board’s recommendation on November 21, 2006.

The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on February 20, 2007, and that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The Hearing judge also took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and law at issue, the Hearing Judge now submits these Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

¹ Beer and wine (grocery) dealer located in an incorporated area. Ind. Code § 7.13-5-2(a).

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
1. Ray McIntosh, Applicant;
 2. Donna Fox, Employee.
- B. The following individuals testified before the Local Board against the Applicant in this cause:
1. Walter Helmke, Attorney for Package Liquor Store Alliance;
 2. Ellen Fox, Representative of Community Service Council; and,
 3. Ronald Jennings, Representative of Sun Mead Woods Community Association..
- C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
1. Article – *S & V Liquors Building New Store*, Unknown source; and,
 2. Petitions in Support of the Applicant containing seventy three (73) customer signatures.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. Letter from the Community Service Council opposing issuance of permits to gas stations/convenience stores; and,
 2. Summary of businesses that sell alcohol within (i) ½ mile of Applicant; and, (ii) 1 mile of applicant.

III. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
1. Jeffrey McKean, Attorney for the Applicant;
 2. Ray McIntosh, Applicant; and,
 3. Russ McIntosh, Applicant's father and founder of the company.
- B. The following individuals testified before the Commission against the Applicant in this cause:
1. Ellen Fox, Representative of Community Service Council; and,
 2. Andy Lebamoff, Competitor.
- C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Findings of Fact and Conclusions of Law - *Kocolene Oil Corporation v. Indiana Alcoholic Beverage Commission*, CV781-322 (1984);
2. Findings of Fact and Conclusions of Law - *The Pantry, Inc. v. Indiana Alcoholic Beverage Commission*, 26C01-8901-CP-0005 (1990);
3. Letter from former Executive Secretary Daniel M. Steiner to local alcoholic beverage boards regarding (i) need and desire; and, (ii) convenience stores.
4. Findings of Fact and Conclusions of Law – *Kocolene Marketing, LLC, Permit No. DL28-94299* (2005);
5. Findings of Fact and Conclusions of Law – *Mac’s Convenient Store, Permit No. DL79-21223* (2005);
6. Findings of Fact and Conclusions of Law – *Casey’s Enterprises, LLC, Permit No. DL34-20256* (2005);
7. Findings of Fact and Conclusions of Law – *Casey’s Enterprises, LLC, Permit No. DL84-20757* (2005);
8. Findings of Fact and Conclusions of Law – *Mac’s Convenient Store, Permit No. DL49-21244* (2005);
9. Findings of Fact and Conclusions of Law – *Smoke Shop II & IV, Inc., Permit No. DL46-21320* (2005);
10. Findings of Fact and Conclusions of Law – *American Oil Company, Inc., Permit No. DL49-18873* (2005);
11. Findings of Fact and Conclusions of Law – *American Oil Company, Permit No. DL41-18884* (2002);
12. Photos of interior Applicant’s store;
13. Summary of (i) invested capital; (ii) grocery inventory; (iii) size; (iv) sales; and (v) average daily non fuel customers;
14. Photos of exterior of Applicant’s store;
15. Petitions submitted to the Local Board in Support of the Applicant containing seventy three (73) customer signatures;
16. Petitions submitted to the Commission in support of the Applicant containing one hundred thirty eight (138) signatures;
17. Summary of all signatures on petitions in support of the Applicant;
18. Letter from Rich Miller, resident of New Haven, in support of the Applicant;
19. Letter from Shari Dominique, resident of New Haven, in support of the Applicant;
20. Letter from Martha Doan, resident of New Haven, in support of the Applicant;
21. Letter from Kirk Reuille, resident of Fort Wayne, in support of the Applicant;
22. Letter from Bob Hess, resident of Decatur, in support of the Applicant;
23. Letter from Alison Witte, resident of Fort Wayne, in support of the Applicant;
24. *Census 2000 Population Compared to 1990*, STATS Indiana (2001);
25. *Census 2000 Housing Compared to 1990*; STATS Indiana (2001);
26. Summary population for New Haven in (i) 1990; (ii) 2000; and, (iii) 2005;
27. Summary of active quota permits for (i) drug stores; (ii) grocery stores; and, (iii) package stores in the city of New Haven;
28. Itemization of grocery store permits in New Haven;
29. Article – *S & V Liquors Building New Store*, Unknown source;
30. Summary of Dealer Alcoholic Beverage Permits in Comparably Populated Indiana Cities and Towns;

31. Local Board transcript, November 13, 2006;
32. Safety Training Meeting Sign Up Sheet, January 30, 2007 and Training Video In Store Test; and,
33. Mapquest – Applicant’s distance to nearest competitor.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. Letter from the Board of Commissioners of the County of Allen opposing issuance of permits to gas stations/convenience stores;
2. Letter from the Mayor of New Haven opposing issuance of permits to gas stations/convenience stores;
3. Letter from the Mayor of Fort Wayne opposing issuance of permits to gas stations/convenience stores; and,
4. Letter from the Community Service Council opposing issuance of permits to gas stations/convenience stores.

IV. FINDINGS OF FACT

1. The Applicant, McIntosh Energy Company, Inc., d/b/a Mac Food Mart, 6925 State Road 930 East, Fort Wayne, Indiana 46803, permit number DL02-22761, is the applicant for a type 115 Commission permit. (ATC File).
2. The Applicant maintains a reputation for decency and law obedience in the community in which it conducts business. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10. (ATC Hearing).
3. There is a need for the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(a). (LB Hearing and ATC Hearing).
4. The neighborhood and community desire to receive the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(b). (LB Hearing and ATC Hearing).
5. The services of the Applicant at the proposed permit premises would have a positive impact on the neighborhood or community in which it is proposed to be located. 905 IAC 1-27-4(d). (LB Hearing and ATC Hearing).
6. The proposed permit premises is more than 200 feet from a church or school. Ind. Code § 7.1-3-21-11. (ATC File).

7. The Applicant sells milk, bread, meat, cereals, canned goods, condiments, boxed goods, salad dressing, pickles, soft drinks, coffee, pet foods, crackers, chips, juices, beauty aids, toiletries, cookies, paper products, butter, dairy products and other items customarily found in a grocery store. (LB Hearing and ATC Hearing).
8. The proposed permit premises is not in a residential district as referred to in Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (LB Hearing and ATC Hearing).
9. The Applicant's invested capital in grocery facilities is One Million One Hundred Twenty Four Thousand Three Hundred Twelve Dollars and Sixty Four Cents (\$1,124,312.64) (ATC Hearing).
10. The Applicant's current annual gross grocery sales are approximately One Million One Hundred Seventy Four Thousand One Hundred Eighty Nine Dollars (\$1,174,189). (ATC Hearing).
11. The Applicant devotes (i) forty seven percent (47%); or, three thousand (3000) square feet of its total floor space to food and grocery items. (ATC Hearing).
12. A substantial portion of the business carried on or to be carried on at the proposed permit premises is in the nature of the Applicant's main business function as a grocery/convenience store. Ind. Code § 7.1-3-1-19. (LB Hearing and ATC Hearing).
13. The Applicant's business satisfies the "character of business" test. (ATC Hearing).
15. The Applicant's stores are similar to stores of competitors holding alcoholic beverage permits in Indiana. (ATC Hearing and ATC File).
16. The Applicant submitted in excess of two hundred eleven (211) signatures of persons from New Haven and Fort Wayne in favor of the issuance of the permit and who frequent the business of the Applicant. (ATC Hearing).

17. The Local Board's proffered basis for denial of the permit on the Local Board Voting Sheet was (i) "no need for services"; and (ii) "neighborhood and community do not desire to receive services at the above location"; however, the Local Board's statements at the LB Hearing contradict that conclusion. (LB Hearing).

18. Although Local Board member Betty Stein stated she voted for denial based on "no need for services," the other Local Board members stated the following:

a) Mark Joseph stated that his opinion might be different if there was no remonstrance, but the Applicant had not met their burden of proving a need for the services; and,

b) Officer Barchak focused on the fact that the Applicant referred to the business as a convenience store. He stated, "...I'll go right to the state statute Indiana Code § 7.1-3-5-2, eligibility, the Commission may issue a beer dealer's permit only to the applicant who is proprietor of a drug store, grocery store, or packaged liquor store, period."

19. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the

Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.

8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).

9. The proposed permit premises are not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.

10. The proposed permit premises are more than 200 feet from a church or school. (ATC File). Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.

11. The Applicant is not disqualified from holding a Commission beer and wine grocery permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-15-2.

12. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

13. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

14. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).
15. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
16. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
17. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
18. There is a need for a beer and wine grocery permit at the Applicant's location. 905 IAC 1-27-4 (a).
19. The neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)
20. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business carried on at the permit premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 829 (Ind. App. 1982).
21. The Commission may issue a beer and wine grocery permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19. *Id.*
22. The phrase "in the nature of the applicant's main business function" as applied in Ind. Code § 7.1-3-1-19 to grocery stores means the retail sale of products typically found in an

Indiana grocery store. See *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 832 (Ind. App. 1982).

23. The term "grocery store", in common usage, means a building or structure where groceries are kept for sale. *Goldstine v. State*, 103 N.E.2d 438, 442 (Ind. App. 1952).

24. The word "substantial", as used in Ind. Code § 7.1-3-1-19, means something more than a nominal amount, something more than seeming or imaginary, it does not mean fifty percent (50%) or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

25. The phrase "in the premises", as used in Ind. Code § 7.1-3-1-19, means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. Ind. Code § 7.1-1-3-20.

26. Where an applicant carries and sells a large number of non-taxable grocery items as well as ordinary household products and miscellaneous items not inconsistent with the sales of a typical grocery store, such sales are substantial within the meaning of the "character of business" test. Ind. Code § 7.1-3-1-19.

27. The Applicant has established that a substantial portion of its business at the proposed permit premises is in the nature of a grocery store.

28. The Applicant has submitted substantial evidence that it meets the "character of business" test for a grocery store and is qualified to hold a Commission Type 115 beer and wine grocery permit.

29. The law does not permit the denial of an alcoholic beverage permit because an applicant sells fuel and oil products. *Kocolene Oil Corporation v. Indiana Alcohol and Tobacco Commission*, Cause No. CV781-322 (1984).

30. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 831 (Ind. App. 1982).
31. To deny the application to Applicant while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.
32. The Local Board denied this application without sufficient evidence to support a finding that this permit should not be issued.
33. A local board's recommendation is clearly erroneous when there is a lack of substantial evidence to support the recommendation. Ind. Code § 7.1-3-19-11.
34. The Commission may decline to follow the recommendation of a local board where the recommendation is not based upon substantial evidence. *Id.*
35. The Applicant has submitted substantial evidence that it is qualified to hold a Commission Type 115 grocery beer and wine permit. (LB Hearing and ATC Hearing).
36. The Commission may reverse a local board's action in denying an application for a permit if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.
37. The Local Board's action in denying the application of the permit of this Applicant in this matter was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess

of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

38. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to recommend denial of the permit application of the Applicant in this matter was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. It is further Ordered, Adjudged and Decreed that that the evidence adduced at the ATC Hearing was in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant, McIntosh Energy Company, Inc., d/b/a Mac Food Mart, 6925 State Road 930 East, Fort Wayne, Indiana 46803 for the application of this Type 115 permit no. DL02-22761 is approved, the recommendation of the Local Board in this matter is reversed, and the permit applied for herein is hereby GRANTED.

DATED: _____

U-Jung Choe, Hearing Judge